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IN THE

Supreme Court of the United States

October Term, 1972

Nos. 72-269, 72-270, 72-271

ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Appellants,

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY *et al.*,

Appellees;

WARREN M. ANDERSON, as Majority Leader and President pro tem of the New York State Senate,

Appellant,

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY *et al.*,

Appellees;

CATHEDRAL ACADEMY *et al.*,

Appellants,

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF for APPELLANTS CATHEDRAL ACADEMY, ST. AMBROSE SCHOOL and BISHOP LOUGHLIN MEMORIAL HIGH SCHOOL

POINT I

The Record Establishes that the Mandated Services Act Reimbursement Formulas Are Reasonable and Do Not Result in Any Excessive or Illegal Payments to Nonpublic Schools

Basic to appellees' case is the argument that the statutory reimbursement of 15 cents per elementary pupil per day of attendance (25 cents for secondary school pupils) is excessive and that nonpublic schools are in fact being substantially overpaid for performing the services mandated by law. Appellees assert that the hypothetical overpayments are—or could be—used for religious purposes. The short answer, however, is that there are and can be no such overpayments. As Judge Palmieri, dissenting below, pointed out:

> . . . The statute invalidated by the majority decision is a reimbursement statute. It provides only a fractional reimbursement for the cost of record keeping and testing by non-public schools and required of them by state law and regulation. The record is uncontested that the sums appropriated by the legislature to assure attendance and adequate examination procedures are much less than the schools expend for such purposes. This provides adequate assurance that government funds are not available for examination functions peculiar to religious institutions. 342 F. Supp. at 445; JS Appendix, p. 15a. —

Judge Palmieri's statement is fully supported by the cost studies and findings of the Education Department which form part of defendant Nyquist's Answers to plain-

tiffs' interrogatories.[1] In connection with these cost studies and findings, the parties have stipulated that the answers to interrogatories and exhibits relating thereto "may be taken as accepted facts for the purposes of this case." Appendix, p. 91a.

Appellees' argument rests on false assumptions and overlooks some crucial factors. For example, appellees state at page 21 of their brief that "administration of internal tests" is "not 'provided for or required by law or regulation.'" This statement is wrong. Section 3204(2) of the Education Law, cited in our main brief, requires that the instruction given to a minor "elsewhere than at a public school shall be at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides." The overwhelming majority of tests given in the public schools are formulated, administered and graded by teachers. It is inconceivable that equivalency could be reliably and validly assessed if teachers in nonpublic schools gave no such tests on a progressive basis. Indeed, the Commissioner of Education has promulgated a specific regulation (§176.1(b)) requiring nonpublic schools to maintain a continuing program of testing. This regulation (nowhere cited by appellees) reads:

> *Such [nonpublic] school shall conduct in all grades in which instruction is offered a continuing program*

[1] The majority opinion below does not take issue with Judge Palmieri's statement. After stating that "[n]o factual disputes exist" [342 F. Supp. at 440; JS Appendix, p. 3a], the majority admits: ". . . If such items as "teacher examinations" and "entrance examinations" are included in the list of "mandated services," it appears that the schools' expenses are at least as great as the amounts they receive from the state. 342 F. Supp. at 441: JS Appendix, p. 5a.

> *of individual pupil testing designed to provide an adequate basis for evaluating pupil achievement,* and in addition, shall administer, rate and report the results of all specific tests or examinations which may be prescribed by the commissioner. Appendix to our main brief, p. 6a (emphasis added).

The Mandated Services Act specifically provides reimbursement for this testing, which is required by both law and regulation. Section 2 of the Act reads, in pertinent part:

> There shall be apportioned . . . amounts . . . for expenses . . . in connection with administration, grading and the compiling and reporting of the results of tests and examinations . . .

Appellees argue that this language in the Act does not cover periodic tests and examinations administered by the schools. But the language of the statute is not so limited, and the Education Department has specifically construed "mandated services" to include such periodic examinations. Exhibit F, Supplement to Appendix, for example, is a background informational study on the Mandated Services Act prepared by the Education Department on April 16, 1970, the day that Governor Rockefeller submitted the Act to the Legislature. This study sets forth a description of mandated services. The first three such services listed are:

1) PEP testing.

2) Regents examinations for those schools offering a Regents diploma, plus equivalent examinations[2] for such areas in which Regents exams are not offered.

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[2] These examinations are prepared by individual teachers.

3) *Periodic examinations for the evaluation of the progress of students.* (emphasis added)

The contemporaneous construction of the Act by the department charged with the responsibility of setting its machinery in motion is "entitled to great weight". *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 549, *rehearing denied*, 311 U.S. 724 (1940); *Lightbody* v. *Russell*, 293 N.Y. 492, 496, 58 N.E.2d 508, 510 (1944).

The Education Department prepared cost analyses after the Act had been in force for several months. Exhibit D, Supplement to Appendix. These analyses contain detailed estimates of the costs incurred by nonpublic schools for mandated services, including periodic examinations. All three "Modes" reach the conclusion that the *direct* expenses[3] for mandated services incurred by the schools analyzed exceeded the amounts provided under the Mandated Services Act. Hence, the overall conclusion:

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[3] Appellees' only "reservation" with respect to the calculations contained in Exhibit D is based upon the fact that "Mode I" analyzes certain "indirect costs", such as a proportionate share of building maintenance and transportation, which could theoretically be added to the "direct costs" incurred by nonpublic schools in performing the mandated services. Exhibit D is careful to point out, however, that whether or not such "indirect costs" or "costs beyond direct costs" are taken into consideration, the *direct* costs alone exceed the payments under the Act.

Not only do appellees attempt to misconstrue the meaning and use of "indirect costs" in Exhibit D, they also attempt to create the impression at page 19 of their brief that more than a third of a teacher's time "*in school*" is spent on nonteaching services. But, in attempting to estimate costs for professional work hours involved in the preparation, administration, correction and recording of tests, "Mode III" specifically warns against misinterpretation of the 52.4 days and 10 days referred to by appellees on the ground that translation of "*out-of-school*" hours into school days inflates the number of days. *See* Mode III, p. 3, para. 5, Exhibit D, Supplement to Appendix.

ON THE BASIS OF THE MATERIAL HEREIN PRESENTED, IT IS EVIDENT THAT THE $28,000,000 APPORTIONED AMOUNT SPECIFIED WITHIN CHAPTER 138 OF THE LAWS OF 1970 IS JUSTIFIED.

IN ADDITION it also appears that nonpublic schools are currently providing considerably more in mandated services than they are receiving in financial aid. Exhibit D, Supplement to Appendix, p. 1 (emphasis in original).

In attempting to support their argument that the sums received by qualifying schools bear no relationship to the costs of mandated services, appellees quote at page 5 of their brief a portion of a sentence from page ES 1.8 of Exhibit G, Supplement to Appendix, which states that "reimbursement [under the Mandated Services Act] is provided on the basis of a formula which is in itself independent of such costs . . ." However, the paragraph from which this excerpt is quoted does not support their argument concerning the alleged lack of a proper relationship between the sums apportioned pursuant to the Mandated Services Act and the sums expended for such services by nonpublic schools. What it says in full is this:

> While we commonly refer to the Chapter in terms of mandated services, the above implies that the schools are being reimbursed for examinations and testing regardless of whether or not such examinations and tests are precisely stated requirements of the Regents and the State Education Department. Under such an interpretation, as might be expected, the cost data from different schools vary widely, particularly in terms of the different allocations provided to classroom testing. *The comments and examples provided below, therefore, should not be construed as*

> *indicating that schools are receiving funds contrary to the law.* As a matter of fact, reimbursement is provided on the basis of a formula which is in itself independent of such costs; a formula apparently based on an estimate of what such costs might have been at the time of enactment of the law. (emphasis added)

As for the "Taber report" in Exhibit G, it does not take into consideration costs incurred for the preparation and administration of periodic examinations. The report is therefore only relevant here insofar as the costs of mandated services other than periodic examinations are concerned. It does not reflect any determination by the Education Department that these periodic examinations are not mandated. On the contrary, on page ES 1.10 of Exhibit G, the Education Department representative refers to Exhibit D as follows:

> The entire study . . . concluded that, *including costs of classroom and school testing as appears consistent with Chapter 138 of the Laws of 1970 as written,* the nonpublic school incurred costs for all listed services are estimated to be equal to or to exceed the reimbursement provided in the Chapter. (emphasis added)

In summary, as Judge Palmieri pointed out, the uncontested evidence in this case clearly shows that the formulas adopted by the New York Legislature provide only "fractional reimbursement" of nonpublic schools for the expense of the heavy administrative burdens imposed upon them by state law. Two examples illustrate the soundness of the formulas. Under Mode II in Exhibit D, nonpublic schools were paired with public schools in the same area. Holy Trinity High School in Hicksville actually spent $232.90 per pupil per annum to perform the services mandated by

state law,[4] as against a statutory reimbursement of $45 for the year. It cost Hicksville's public high school, on the other hand, $361.72 per pupil per annum to perform the same services.[5] Corpus Christi Elementary School in Mineola spent $77.56 per pupil per annum on mandated services,[6] as against reimbursement under the Act of $27 for the year. The Willis Avenue public elementary school in the same city spent $474.12 per pupil per annum.[7] In conclusion, Mode II states:

> Without hesitation we can clearly point out that all schools sampled expend substantially more for mandated services than the State formula of reimbursement represents in assistance for the nonpublic schools, i.e., $27 maximum for an elementary child and $45 maximum for a secondary child.[8]

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[4] *See* Mode II, p. 14, Exhibit D, Supplement to Appendix.

[5] *See id.* at 18.

[6] *See id.* at 29.

[7] *See id.* at 32.

[8] *Id.* at 46.

POINT II

State Reimbursement of Costs Incurred in Administering Examinations Does Not Result in an Impermissible Entanglement

In *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971), as in the earlier case of *Walz* v. *Tax Commission of the City of New York,* 397 U.S. 664 (1970), this Court recognized that some entanglement or involvement between church and state is permissible and, indeed, inevitable. Only "excessive involvement" is unconstitutional.

An analysis of the New York educational system applicable to both public and nonpublic schools (described at pages 17-24 of our main brief) shows that the Mandated Services Act does not involve any propensity for entanglement above and beyond the type of extensive visitatorial and other powers which New York has historically exercised over its nonpublic schools. Nevertheless, appellees argue that the Mandated Services Act involves unconstitutional entanglement of government with religion in that "testing is an instrument of instruction"[9] and this Court held in *Lemon* v. *Kurtzman* that partial payment by the state of nonpublic schoolteachers' salaries involved unconstitutional *excessive* entanglement.

Within the purview of the Mandated Services Act, however, testing is an instrument of assessment or evaluation for assuring the state that both public and nonpublic schools are maintaining appropriate levels of educational achievement. Section 1 of the Act states, in part, that

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[9] Brief for Appellees, p. 22.

> the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities.

In providing for the maintenance of acceptable levels of achievement, the state's interest is only in the levels themselves and *not* in the methodology through which they are achieved. In other words, the focus of the Mandated Services Act is strictly neutral and nonideological.

By way of comparison, in *Lemon* v. *Kurtzman,* the ultimate focus of the salary supplement statutes in question (and of this Court) was on the substance of certain secular subjects as taught by lay teachers in parochial schools. It was decided that a "comprehensive, discriminating, continuing state of surveillance" [10] on the part of government would be required to assure that these secular subjects were free of religious overtones. No such surveillance is either necessary or useful with respect to New York's particular interest in continuous testing.

There is nothing in the record in this case which shows that examinations are used for purposes of teaching religion in nonpublic schools, a fact which appellees are forced to concede in their brief. *See* Brief for Appellees, p. 25. Nevertheless, appellees' claim essentially is that education in the nonpublic schools is permeated with religion. But this Court has previously rejected that contention with

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[10] 403 U.S. at 619.

respect to these schools in New York State. *See Board of Education* v. *Allen*, 392 U.S. 236, 248 (1968); *Tilton* v. *Richardson*, 403 U.S. 672, 681 (1971). Then again, the state's own examinations, all of which are administered by nonpublic schools, are surely neutral and nonideological, to begin with.

Conclusion

The Mandated Services Act is in all respects constitutional, and the judgment appealed from should be reversed with a direction to the District Court to dismiss the complaint.

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Respectfully submitted,

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